Waivers of Complementarity in the ICC: Legality and Implications

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The Rome Statute, the International Criminal Court's (ICC) constitution, treats states' self-referrals of suspects before the ICC as a last resort for when states are unable to prosecute crimes domestically. Yet some states that are capable of prosecuting crimes domestically have controversially bypassed domestic prosecution in favor of prosecution by the ICC. Such states have abdicated their responsibility to exhaust local remedies and thus "waived" their duty to treat the ICC as complementary to domestic courts. This article examines the legality of such waivers of complementarity within the interpretive framework of the Vienna Convention on Treaties of 1969. Specifically, this article illustrates from linguistic, purposive, and pragmatic analyses that waivers of complementarity violate the Rome Statute. The article culminates with the author's new theory of a binary complementarity regime that precludes waivers and with the normative implications of waivers for states' sovereignty, territorial integrity, and political independence.

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Introduction

In 1998, the diplomats of UN Member states convened in Rome for the unprecedented act of establishing an International Criminal Court ("ICC"), one with the lofty aim of ending impunity for the perpetrators of heinous crimes and securing respect for international justice.[1] The byproduct of their momentous convention was the Rome Statute (or "ICC Statute"), a treaty promulgating the jurisdiction, object, and composition of the ICC.[2] The Rome Statute obliges its member states to prosecute serious international crimes domestically if possible, and thus to treaty the ICC as complementary to domestic courts.[3]

Although the Rome Statute treats states' self-referrals of suspects before the ICC as a last resort for when states are unable to prosecute crimes domestically,[4] some states have controversially relinquished their national jurisdiction,[5] or in academic terms, waived the principle of complementarity. Analyzing waivers of complementarity from linguistic, teleological (purposive), and pragmatic perspectives, this article illustrates that waivers are not legally permissible under the Rome Statute. The article concludes with the author's new theory on waivers and their normative implications for the sovereignty and reputation of states.

I. ICC Jurisdiction and Methods of Referral

Assenting to the ICC's jurisdiction, 118 nations ultimately ratified the Rome Statute,[6] while additional countries, including the United States, signed the treaty but refused to ratify it.[7] Entering into force on July 1, 2002,[8] the Rome Statute accords the ICC jurisdiction that is circumscribed by subject matter, temporal mandate, state consent, and the defendants'

1. Rome Statute of the International Criminal Court, July 17, 2002, ICC 1, 1, https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf [https://perma.cc/G946-83PZ] [hereinafter Rome Statute]; *see also* Britta Lisa Krings, *The Principles of 'Complementarity' and Universal Jurisdiction*, *in* INTERNATIONAL CRIMINAL LAW: ANTAGONISTS OR PERFECT MATCH?, 4 GOETTINGEN J. INT'L L. 737, 749 (2012).

2. Rome Statute, *supra* note 1, at 1–3.

3. *Id.* at 1.

4. Britta Lisa Krings, *The Principles of 'Complementarity' and Universal Jurisdiction*, *in* INTERNATIONAL CRIMINAL LAW: ANTAGONISTS OR PERFECT MATCH?, 4 GOETTINGEN J. INT'L L. 737, 750 (2012).

5. *See, e.g.*, Payam Akhavan, *The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court*, 99 AM. J. INT'L L. 403, 404 (2005).

6. *Chapter XVIII Penal Matters: Rome Statute of the International Criminal Court*, UNITED NATIONS TREATY COLLECTION (Apr. 4, 2021), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en [https://perma.cc/H992-DDK3].

7. The United States deems the Rome Statute "seriously flawed." OAS A.G. Res. 2039 (XXXIV-O/04), (May 20, 2004), *Annex: Statement by the Delegation of the United States*, http://www.oas.org/juridico/english/ga04/agres_2039.htm [https://perma.cc/N5MP-K6YY].

8. *Joining the International Criminal Court: Why Does It Matter?*, INTERNATIONAL CRIMINAL COURT 1, 3 (2018), https://www.icc-cpi.int/Publications/Joining-Rome-Statute-Matters.pdf [https://perma.cc/HWE5-DKM8].

personhood.[9] Of these, the subject matter operates as the most dominant jurisdictional constraint, permitting the ICC to exercise jurisdiction only when the crime committed is of one of the types of serious crimes expressly enumerated within the Rome Statute: war crimes, genocide, crimes against humanity, and the crime of aggression.[10]

To comply with the ICC's temporal jurisdiction, the court may only hear cases involving crimes committed after ratification of the Rome Statute on July 1, 2002.[11] In accordance with the state-consent requirement, a member state impliedly consents to the ICC's potential jurisdiction when a perpetrator is one of the state's nationals or commits an enumerated crime within its territory, and the state does not exercise jurisdiction over the crime.[12] Nevertheless, a state whose domestic laws uniquely allow for universal jurisdiction over international crimes may raise an issue before the ICC even if no substantial nexus exists between the state and the crime, aggressor, or victim.[13] A nonmember state, by contrast, may consent to the court's jurisdiction by a declaration to the registrar.[14] As for the personhood constraint, the ICC enjoys jurisdiction over solely literal adult persons, not the fictitious juridical "persons" with legal personality such as corporations, transnational organizations, or countries.[15]

The ICC's jurisdiction is ultimately predicated on the cases or situations referred to it. Three methods exist for referring a case to the ICC. First, the United Nations Security Council may, by resolution, refer a case to the ICC.[16] Second, the ICC prosecutor may, by his or her own *proprio motu* powers, raise a case to the ICC.[17] Third and most common, member states may refer to the ICC cases or situations occurring in their own jurisdiction or involving their nationals.[18]

Although the third method, a state's self-referral, controversially entails a state voluntarily deferring to the ICC's jurisdiction over the state's own, self-referrals are not in and of themselves legally dubious; indeed, the Rome Statute expressly authorizes self-referrals. The controversy surrounding a state's self-referral arises only when the state had been willing and able to prosecute the perpetrator yet still elected to refer the case to the

9. Rome Statute, *supra* note 1, at 8–9.

10. *Id.* at 3, 9.

11. *Id.* at 8.

12. *Id.* at 8, 10–11.

13. *See* Markus Benzing, *The Complementarity Regime of the International Criminal Court: International Criminal Justice Between State Sovereignty and the Fight Against Impunity*, *in* 7 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 592, 623 (A. von Bogdandy & R. Wolfrum eds., 2003).

14. Rome Statute, *supra* note 1, at 8.

15. *See Joining the International Criminal Court: Why Does It Matter?*, INTERNATIONAL CRIMINAL COURT 1, 6 (2018), https://www.icc-cpi.int/Publications/Joining-Rome-Statute-Matters.pdf [https://perma.cc/53AW-S4Z6].

16. *How the ICC Works*, *ABA-ICC Project*, AM. BAR ASS'N (April 26, 2021), https://how-the-icc-works.aba-icc.org/ [https://perma.cc/ZQ4N-4YZG].

17. *Id.*

18. *Id.*

ICC.[19] Such an abdication of the duty to prosecute crimes domestically whenever possible[20] crosses the line from a permissible self-referral into an outright waiver of the complementarity principle.

II. Admissibility

Once the ICC establishes its jurisdiction over a case referred to it, it must still ascertain whether a crime is admissible before initiating a prosecution. Crimes are admissible when they satisfy the principles of gravity and complementarity.[21] The Rome Statute does not define gravity, though the ICC's Office of the Prosecutor has defined gravity by reference to the "scale," "severity," "impact," "systematic nature," and method of committing crimes.[22] By contrast, the Rome Statute does define complementarity. The principle denotes that the ICC's jurisdiction complements, rather than replaces, national criminal jurisdiction.[23] Accordingly, cases or situations are inadmissible when the state is willing and able to prosecute them domestically.[24]

The Rome Statute reprises the complementarity principle in Part 1 regarding the establishment of the court and explains the principle's import in Articles 17 through 19, highlighting states' implicit duty to exhaust all local remedies before resorting to the ICC.[25] Indeed, the ICC is "only meant to act when domestic authorities fail to take the necessary steps in the investigation and prosecution of crimes enumerated in article 5 of the Statute."[26] Thus, the ICC is intended as a court of "last resort."[27]

A central purpose of complementarity is to safeguard the sovereignty of states, which enjoy the right to "exercise criminal jurisdiction over acts within their jurisdiction."[28] Accordingly, the principle of complementarity is frequently described as "the cornerstone of the Rome Statute,"[29] one that "permeates the entire structure and functioning of the Court."[30] The ICC prosecutor weighs the principle when ascertaining whether to initiate an investigation[31] and implicitly adheres to the principle after initiating an investigation by collaborating with a state in procuring evidence, deposing

19. Rome Statute, *supra* note 1, at 10–11.
20. *Id.*, at 1.
21. *Id.*, at 10–11.
22. Susana Sacouto & Katherine Cleary, *The Gravity Threshold of the International Criminal Court*, 23 Am. U. Int'l L. Rev. 808, 810 (2008).
23. Britta Lisa Krings, *The Principles of 'Complementarity' and Universal Jurisdiction*, *in* International Criminal Law: Antagonists or Perfect Match?, 4 Goettingen J. Int'l L. 737, 749 (2012); Rome statute, *supra* note 1, at 1.
24. Rome Statute, *supra* note 1, at 10–11.
25. *Id.*
26. Benzing, *supra* note 13, at 592.
27. Britta Lisa Krings, *The Principles of 'Complementarity' and Universal Jurisdiction*, *in* International Criminal Law: Antagonists or Perfect Match?, 4 Goettingen J. Int'l L. 737, 750 (2012).
28. Benzing, *supra* note 13, at 595.
29. *Id.* at 593.
30. *Id.*
31. *Id.*

witnesses, and hailing suspects before the court.[32]

Even after the ICC has established its jurisdiction and the admissibility of the case, the prosecutor may still opt out of an investigation if it "would not serve the interests of justice."[33] Before opting out, the prosecutor must mull over the "gravity of a crime and interests of victims" and raise "substantial reasons" to jettison the investigation.[34] Additionally, the prosecutor would have first ascertained "whether, under Article 53(1)(a) of the Rome Statute, the information available . . . provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed."[35] The state's failure to "respond to a request by the prosecutor" or to furnish information regarding the investigation triggers a presumption that the case is admissible.[36]

III. Prior Waivers of Complementarity

In 2003, Uganda became the first country to refer a situation to the prosecutor of the ICC by "invoking articles 13 and 14 of the Rome Statute in order to vest the court with jurisdiction."[37] Uganda referred a situation surrounding the Lord's Resistance Army (LRA), an insurrectionist group that has long sought to establish a theocracy in Uganda by dastardly tactics.[38] In the words of former U.S. President Obama, the LRA has "murdered, raped, and kidnapped tens of thousands of men, women, and children in Central Africa" and "commit[ted]" atrocities across the Central African Republic, the Democratic Republic of the Congo, and South Sudan. . . ."[39] In addition, the LRA has forcibly conscripted children into the armed forces and subjected many young girls to forced marriages and sexual slavery.[40]

Significantly, Uganda's referral of the LRA situation to the ICC enhanced confidence in the then embryonic court, bolstering perceptions of its viability and credibility.[41] But the referral was perhaps equally significant as an initial attempt at comporting with the complementarity principle. By some accounts, the Ugandan judiciary was both "willing and able" to prosecute the LRA suspects,[42] so the Ugandan referral was legally

32. *Id.*; *see also* Britta Lisa Krings, *The Principles of 'Complementarity' and Universal Jurisdiction*, *in* INTERNATIONAL CRIMINAL LAW: ANTAGONISTS OR PERFECT MATCH?, 4 GOETTINGEN J. INT'L L. 737, 750 (2012).

33. Rome Statute, *supra* note 1, at 24, as cited in Akhavan, *supra* note 5, at 415.

34. *Id.*

35. Akhavan, *supra* note 5, at 412.

36. Benzing, *supra* note 13, at 628.

37. Akhavan, *supra* note 5, at 403.

38. Elizabeth Flock, *Joseph Kony and the Lord's Resistance Army: a Primer*, WASH. POST (Oct. 14, 2001), https://www.washingtonpost.com/blogs/blogpost/post/obama-deploys-combat-forces-to-fight-lords-resistance-army-in-central-africa/2011/10/14/gIQAYB8KkL_blog.html [https://perma.cc/S6BL-K7U7].

39. *Id.*

40. Akhavan, *supra* note 5, at 407.

41. *Id.* at 404.

42. *Id.* Payam Akhavan suggests that the Ugandan judiciary was "willing and able" to prosecute the suspects but nevertheless concludes that the Ugandan referral did not

dubious from a complementarity standpoint. Uganda's decision to voluntarily relinquish its own authority to prosecute LRA suspects at least facially contravened the last-resort standard for self-referrals that is promulgated in the Rome Statute.[43]

Such a blithe approach toward complementarity hardly established an auspicious first application of the principle. Nevertheless, the extent of Uganda's violation of the principle is mitigated by the fact that Uganda struggled to militarily disrupt the LRA, which received assistance from the Sudanese government.[44] Therefore, the prosecution of numerous LRA suspects likely bedeviled Uganda with practical conundrums in terms of judicial resources and the apprehension of all the defendants. But such judicial constraints would at most warrant Uganda more narrowly referring to the ICC cases involving solely suspects that Uganda is incapable of prosecuting, not referring every suspect, including the ones Uganda could prosecute. The Ugandan referral, then, shows that perhaps a state's very approach to a self-referral may violate the complementarity principle even if a separate type of self-referral—one that is not overbroad in scope, duration, or suspects—would not violate the principle.

An impartial post-mortem of the Ugandan referral would demonstrate that it was not per se entirely regressive[45] for Uganda but was of course suboptimal. The part that was "not entirely regressive" was that Uganda was at last committed to one of the twin principal aims of the Rome Statute: to end impunity.[46] That is, considering that Uganda had just years previously offered amnesty to all LRA members in exchange for relinquishing their revolutionary pursuits,[47] Uganda's referral to the ICC represented something of a watershed for the state, one manifesting at last a commitment to ensuring justice for the perpetrators of grievous human rights violations. Furthermore, the self-referral resulted in the arrest and prosecution of some of the top leaders of the LRA, potentially leading to "the LRA's rapid disintegration."[48] The "suboptimal" part of the referral is that Uganda undermined the second of the Rome Statute's principal twin aims: that of imposing a duty on states to exhaust all remedies of national criminal jurisdiction before resorting to the ICC.

Another country that has arguably violated the complementarity principle is Germany. The German legislature passed a law conferring a right

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violate the complementarity principle because the ICC was better equipped to handle the prosecutions, and Uganda's prosecutorial efforts were not successful: many LRA suspects were elusive due to their presence in Sudan, and prosecution was complicated by Uganda's prior grant of amnesty to many suspects. *Id.* at 404, 410, 411, 414. Akhavan further argues that a state's unwillingness and inability to prosecute are not per se prerequisites to an ICC referral when a state has yet to prosecute or investigate a case. *Id.* at 414.

43. Rome Statute, *supra* note 1, at 1.

44. Akhavan, *supra* note 5, at 410.

45. *See, e.g.*, *id.*

46. The other principal aim is to impose a duty on states to exercise their own national criminal jurisdiction.

47. *See* Akhavan, *supra* note 5, at 409.

48. *Id.* at 415.

on its government to waive the complementarity principle.[49] The law permits the government to "abstain from exercising its jurisdiction in favor of a prosecution by the ICC if such restraint is in the interests of justice."[50] The predicament for Germany is that based on the Rome Statute, the only party who is to account for the interests of justice in a referral is the ICC prosecutor.[51] Even for the ICC prosecutor, the interests-of-justice standard serves as a rationale to opt out of an investigation, not to opt in to one as Germany's legislation authorizes.[52]

It is unclear whether the Rome Statue's "interests-of-justice" verbiage colored Germany's decision to incorporate the language into its national law. But whatever animated the legislation, Germany arrogated to itself authority that even the ICC prosecutor does not enjoy. The ICC statute does not allow any party with referral power—whether a state, the UN Security Council, or the ICC prosecutor—to create new conditions on which referrals to the ICC are permitted.[53] Although Germany's intent was likely not to nonchalantly "rubber-stamp" referrals to the ICC, the country still inappropriately implied that it could bypass the complementarity principle by referring cases to the ICC under circumstances beyond those expressly enumerated in the Rome Statute.

A more charitable interpretation of Germany's legislation would presume that cases triggering its "interests-of-justice" standard for self-referrals would in fact accord with the Rome Statute's last-resort standard. Assuming a case would never implicate the "interests-of-justice" standard unless the country exhausted all local remedies and was unable to prosecute a perpetrator, the German legislation would comply with the complementarity principle. Nevertheless, it is difficult to conceive of a situation where Germany, one of the most developed countries in the world, would struggle to prosecute a perpetrator. And if that counterfactual scenario ever arose, Germany's legislation would still beg the question of why the interests-of-justice standard is necessary if the ICC Statute already effects the same purposes. That is, unless Germany engaged in the futile exercise of enacting legislation entirely redundant with the Rome Statute, the very enactment of the legislation troublingly implied the creation of a new basis for recourse to the ICC.

IV. Linguistic Perspective Against Waivers of Complementarity

A linguistic analysis of the Rome Statute proves that it disallows waivers of complementarity. Although states' right of self-referral is "firmly grounded in law,"[54] the contours of that right are constricted by the ICC Statute's complementarity regime. Interpretation of the ICC Statute, like

49. Benzing, *supra* note 13, at 629.
50. *Id.*
51. Rome Statute, *supra* note 1, at 24.
52. *Id.*
53. *Id.* at 9–10.
54. Claus Kress, *'Self-Referrals' and 'Waivers of Complementarity': Some Considerations in Law and Policy*, 2, J. Int'l Crim. Just. 944, 945 (2004).

most other treaties, is governed by the guidelines of the Vienna Convention on Treaties of 1969, known as the "treaty on treaties."[55] Considered customary international law that is binding on the world at large, the Vienna treaty stipulates that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty . . . ."[56] Consequently, a construal of the Rome Statute's text should concentrate on the ordinary or common usage of its provisions. Of these, the most relevant to complementarity is Article 17 regarding admissibility:

> (1) Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute . . . .[57]

Two interpretations exist for Article 17(a)'s phrase "unless the State is unwilling or unable" to prosecute: a waiver-permissive one and a waiver-preclusive one.[58] The waiver-preclusive interpretation categorically constrains the right of self-referral to the scenario where a state is unwilling or unable to prosecute or investigate a case.[59] Accordingly, the "unwilling-or-unable" standard imposes a tall order for satisfying complementarity: only if a state does not investigate a case at all or does not genuinely do so may it refer the case to the ICC. Even if a state has merely planned a future investigation, the state may not refer the case to the ICC. In language that disentangles the confusion of 17(a), the waiver-preclusive interpretation would state that "a case is inadmissible where it is *either* being investigated by a state with jurisdiction over it, *or* the state is both willing and able to carry out the investigation or prosecution." In short, under the waiver-preclusive interpretation, a state enjoys no right to "voluntarily relinquish" its national jurisdiction in favor of jurisdiction by the ICC.

The waiver-permissive interpretation, on the other hand, posits that the "unwilling-or-unable" standard applies exclusively where a state has *already* initiated an investigation or prosecution.[60] Under this construal, if the state has not yet taken any investigatory measures, then no conflict, actual or constructive, may exist between the state's exercise of criminal jurisdiction and the ICC's. And the state's referral would not violate the complementarity principle. In clear language supplanting the ambiguity of

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55. Richard D. Kearney, The Treaty on Treaties, 64 AM. J. INT'L L. 491–561 (1970); Vienna Convention on the Law of Treaties art. 1, May 23, 1969, 1155 U.N.T.S. 332 [hereinafter Vienna Convention].

56. Vienna Convention, *supra* note 55, art. 31, at 340.

57. Rome Statute, *supra* note 1, at 10–11.

58. *See* Akhavan, *supra* note 5, at 413. Akhavan uses the terms "positive and negative" to refer to the two possible interpretations. I have instead embraced the terms "waiver-permissive" and "waiver-preclusive" for greater terminological precision.

59. *Id.*

60. *Id.*

Article 17(a), the waiver-permissive interpretation would state the following: "A case is inadmissible only where it is being investigated or prosecuted by a State which has jurisdiction over it unless the state's actions vis a vis that *ongoing case* manifest that the state is unwilling or unable genuinely to carry out the investigation or prosecution." In brief, absent a state's *ongoing* and genuine investigation, the waiver-permissive construal would allow a state to relinquish its jurisdiction in favor of ICC jurisdiction.

The waiver-permissive interpretation ostensibly enjoys less support within the Rome Statute than does the waiver-preclusive one. The very use of a waiver implies that the state was in fact able to prosecute the aggressor but chose not to, and thus violated the complementarity principle.[61] If a state were truly unable for political or judicial reasons to prosecute an aggressor, its self-referral to the ICC would not amount to a waiver but a fulfillment of complementarity because the ICC statute expressly contemplates self-referrals where states are unable to prosecute.[62]

The best, albeit still tenuous, basis for waivers lies in resolving the ambiguity in 17(a) by reference to subsections (b) and (c). Namely, perhaps the ambiguity in (a) about whether the words "unwilling and unable" reference a state's *ongoing* cases (waiver-permissive) or merely potential cases (waiver-preclusive) could be resolved by the use of "case" in subsections (b) and (c).[63] The statement in (b) that the "case has been investigated" and the statement in (c) that "the person concerned has already been tried" both reference actual as opposed to potential cases.[64] By implication, then, "case" in (a) could likewise refer to actual cases (waiver-permissive).

However, such a construal glosses over the statute's other provisions indicating that the "case" referred to in 17 is merely a potential one (waiver-preclusive). Section 17(2) impliedly refers to latent or prospective cases when it says that a state is deemed unwilling to prosecute a case when "there has been a substantial delay in the proceedings."[65] If a substantial delay occurs, the case has not necessarily begun, possibly rendering the case a mere potentiality.

A similar sense of potentiality is found in 17(3). That section asserts that a state is considered unable to prosecute a case when, "due to a substantial collapse of its judicial system, the state is unable to obtain the accused" or to "carry out its proceedings."[66] A state's inability to carry out proceedings does not per se refer to ongoing cases. The inferential upshot is that 17(1) likely refers to both ongoing and potential cases, an outcome that comports with a waiver-preclusive finding: as previously shown, if the requirement that a state be unwilling or unable to prosecute applies even

61. *See* Rome Statute, *supra* note 1, at 1, 10–11.
62. *Id.*
63. Rome Statute, *supra* note 1, at 10–11.
64. *Id.*
65. *Id.* at 11.
66. *Id.*

amid merely *potential* cases (as opposed to solely ongoing ones), the requirement would effectively bar waivers of complementarity given that virtually any case could be deemed a "potential" one. Indeed, if a case is a mere potentiality, the waiver-preclusive interpretation would require the ICC to accord a state adequate time to at least attempt a domestic prosecution before the ICC initiates an investigation.

Even if Section 17 were too ambiguous to determine definitively that it is waiver-preclusive, supplementary methods of interpretation would still disfavor waivers. According to Article 32 of the Vienna Convention on Treaties, when the meaning of at term is ambiguous or "leads to a result which is manifestly absurd or unreasonable," "[r]ecourse may be had to . . . the preparatory work of the treaty and the circumstances of its conclusion."[67] During delegates' deliberations concerning the ICC Statute, some delegates objected to a recommendation to allow states to voluntarily relinquish national jurisdiction in favor of ICC jurisdiction for crimes under the Rome Statute.[68]

The objectors found that voluntarily relinquishing jurisdiction was not "consistent with . . . the principle of complementarity."[69] For them, the ICC "should in no way undermine the effectiveness of national justice systems and should only be resorted to in exceptional cases."[70] To be sure, the objections by some delegates to waivers of complementarity simply underscore that disagreement existed among states about the validity of waivers.[71] However, given the forcefulness of the objectors' statements, it is unlikely the objectors would have even signed the ICC statute had it contemplated that states could whimsically flout the complementarity principle.

There is an even more compelling reason for the waiver-preclusive interpretation. Namely, if a state could simply waive complementarity, there would be no need for a definition of "unwillingness" or "inability" to prosecute in the Rome Statute, yet the statute furnishes a rather detailed definition of both terms. The statute explains that "unwillingness" is evident when a state unjustifiably delays prosecution or, if the state does prosecute, fails to impartially attempt to bring the accused to justice or prosecutes solely to shield the suspect from criminal responsibility.[72] With such definitional specificity, the court affords ICC legal practitioners a clear touchstone to appraise unwillingness to prosecute the perpetrator.

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67. Vienna Convention, *supra* note 55, art. 32, at 340.; Akhavan, *supra* note 5, at 414.

68. Akhavan, *supra* note 5, at 414. Akhavan points out that the remarks by the objectors to voluntary relinquishment of national jurisdiction are not dispositive for interpretive purposes, and he even argues for a waiver-permissive interpretation; however, his argument for a waiver-permissive approach stems primarily from his perspective that Article 17 is unambiguous in allowing waivers of complementarity, a stance this Note takes issue with.

69. *Id.*

70. *Id.*

71. *Id.*

72. Benzing, *supra* note 13, at 610.

The state may manifest unwillingness by overt means such as obstruction and appointment of a prosecutor who is demonstrably amicable to the accused or by comparatively subtler means such as dilatory tactics, inaction, and disregard of a victim's criminal referral.[73]

The statute's terminological specificity extends to the term "unable" too. That specificity would be moot if states could unconditionally relinquish their jurisdiction over a case. A state is unable to prosecute a case when, "due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings."[74] Noticeably, such verbiage delineates various potential bases for an "inability" finding. And for each, the phrase "due to" implicitly requires the state to prove a "causal link" between the collapse of the judiciary and the defect in the proceedings.[75]

The term "substantial collapse" in reference to a judicial system indicates that the inability standard does not arise by perfunctory routine or mere convenience; indeed, the ordinary meaning of "substantial collapse" evokes an image not of minor judicial shortcomings but of disrepair and disarray. In such a circumstance, a breakdown in the administration of justice occurs, and recourse to an alternative national venue is not possible.[76] Consequently, the "substantial-collapse" verbiage reinforces the ICC Statute's larger objective of treating referrals to the ICC as a mechanism of last resort.

The phrase "unavailability of its national judicial system" seemingly denotes circumstances no less exigent than "substantial collapse," though potentially alludes to not only the judiciary itself but also any circumstances, political or social, that effectively stymy a victim's or the government's access to the judicial system. For anything that substantially hinders access to the judicial system could tenably fall within the taxonomy of an unavailable judicial system. Thus, thousands of disaffected rioters blocking access to courthouses to impede prosecution of their political hero or heroine would warrant a finding of an unavailable judiciary, even if the judicial system itself suffers from no apparent defect for lack of impartiality, independence, the due process, or rule of law.[77]

As mentioned, a waiver of complementarity problematically dispenses with the requirement that a state be unwilling or unable to prosecute to initiate a self-referral. The untenable implication is that ICC definitions of "unwilling" or "unable," let alone lengthy ones, are futile or meaningless because states may flout them with abandon. An outcome of definitional futility would implausibly contradict the universal linguistic norms known as the Gricean Maxims, which are widely followed in the English language,

73. Rome Statute, *supra* note 1, at 11.
74. *Id.*
75. Benzing, *supra* note 13, at 613.
76. *See, e.g.*, *id.* at 614.
77. *See, e.g.*, *id.*

one of the Rome Statue's few authenticated languages.[78] Named for their eponymous creator, Paul Grice, a linguistic philosopher, the Gricean Maxims are four basic norms that universally govern communication and reflect a widely accepted theory of linguistic norms: (1) Maxim of quantity: be maximally informative and "give as much information as is needed, and no more,"(2) Maxim of quality: be truthful, and do not "give information that is false or that is not supported by evidence,"(3) Maxim of relation: "be relevant, and say things that are pertinent . . .," (4) Maxim of manner: "be as clear, as brief, and as orderly" as possible, and "avoid obscurity and ambiguity."[79]

While these linguistic norms of English are not a source of interpretation under the Vienna Convention, linguistic norms—much like dictionaries and judicial opinions—are probative of the common or ordinary usage of terms. Of course, the norms are not semantically dispositive. But generally, the more sources adduced to inform the meaning of a treaty, the more fulsome and defensible the interpretation. And while the Gricean Maxims apply predominantly in English, which is just one of the Rome Statute's various authenticated languages, the Vienna Convention affirms that a treaty is "equally authoritative" in each language that it is authenticated in "unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail."[80] Moreover, the "terms of the treaty are presumed to have the same meaning in each authentic text."[81]

Under the Gricean Maxim of quantity, the framers of the Rome Statute would presumably exclude from the statute any content that is devoid of meaning or import. This maxim would favor an inference that the framers would include no more information in the statute than was necessary. Accordingly, the framers would not incorporate definitions of "unwilling" and "unable"[82] if a state could simply disregard those terms and avoid its duty to exhaust all local remedies before hailing a suspect before the ICC. Unless interpreters are prepared to accept that the drafters incorporated provisions that are altogether needless, it is a fair presumption that the framers adhered to the maxim of quantity, and thus barred waivers of complementarity.

The maxim of quality would suggest that the drafters of the Rome Statute did not misleadingly state that a specific provision is a rule unless it is an actual rule. The likelihood of the drafters, wittingly or unwittingly, imposing a "false" duty on states to exercise national jurisdiction is rather low. The statute's repetitive conferral of that duty, including in the preamble and Section 17, belies an inference that the drafters' language could differ qualitatively from their intended meaning.[83]

78. Rome Statute, *supra* note 1, at 57; Harold Dravling, *Grice's Maxims*, U. PA., https://www.sas.upenn.edu/~haroldfs/dravling/grice.html [https://perma.cc/L45P-8TPL] (last visited Oct 3, 2022).

79. Dravling, *supra* note 78.

80. Vienna Convention, *supra* note 55, art. 33, at 340.

81. *Id.*

82. Rome Statute, *supra* note 1, at 11.

83. *Id.* at 10–11.

Finally, the maxims of relation and manner would connote that the drafters did not include specific terms in the statute unless those terms are relevant and did not present the information haphazardly. The "unwilling-or-unable" standard does not likely reflect a digressive or peripheral comment by a drafter because the standard is invoked throughout the ICC statute explicitly and implicitly and is, on the whole, quite clear.

One potential counter to this linguistic analysis is that the "unwilling-or-unable" standard is merely hortatory or aspirational; thus, even conceding that the statute confers a duty on states to exhaust all local remedies, those duties are not legally binding. The challenge for this rebuttal, however, is that the "unwilling-or-unable" standard is found in the Rome Statute's section on the admissibility of cases.[84] That is, the standard is important enough to bar a case as inadmissible where the standard is not satisfied. The relative paucity of admissibility issues addressed in Section 17 reinforces the significance of exhausting local remedies because with few admissibility issues, the "unwilling-or-unable" standard is quite salient within the text.[85]

V. Teleological (Purposive) Perspective Against Waivers of Complementarity

A teleological (purposive) analysis of the Rome Statute precludes an inference that waivers of complementarity are permissible. The impetus for a teleological analysis is the Vienna Convention on the Law of Treaties, which establishes that a "treaty shall be interpreted in good faith in accordance with . . . its terms in the light of its object and purpose."[86] The object and purpose is a function of, inter alia, the treaty's overall text and preamble and "any agreement . . . between all the parties in connection with the conclusion of the treaty . . . ."[87]

The Rome Statute's preamble emphasizes that the ICC "shall be complementary to national criminal jurisdictions."[88] While that sentence itself does not define "complementary," the preamble states separately "that it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes."[89] This language is unqualified in its conferral of such a duty. The words "every state" are categorical—excepting no state from the duty.

The preamble similarly states that the prosecution of grievous international crimes "must be ensured by taking measures at the national level . . . ."[90] The word "must" expresses the imperative nature of the duty to exercise national jurisdiction. "Must" is unlike other modal verbs. It does not convey a merely hortatory duty. So suggested the United States

84. *Id.* at 10.
85. *Id.* at 11.
86. Vienna Convention, *supra* note 55, art. 31, at 340.
87. *Id.*
88. Rome Statute, *supra* note 1, at 1.
89. *Id.*
90. *Id.*

Supreme Court in its landmark 2008 opinion in *Medellin v. Texas*.[91] U.S. court opinions are of course not authoritative in interpreting the meaning of the Rome Statute but may lend persuasive effect to its terms in a purposive analysis.

The *Medellin* court addressed the question of whether a Texas state court was obligated to enforce a ruling by the International Court of Justice ("ICJ") that directed the United States to comply with its duties under the Vienna Convention on Consular Relations.[92] The United States Supreme Court held that the ICJ ruling was not enforceable in domestic courts.[93] Critically, the court reasoned in part that the source of authority for ICJ judgments, the Charter of the United Nations, "does not provide that the United States 'shall' or 'must' comply with an ICJ decision" and instead provides that each member state merely "undertakes to comply . . . ."[94] Consequently, the court intimated that the modal verb "must" within a treaty like the Rome Statute confers a binding obligation on state parties.[95]

Given that even the United States, which is often more reticent than most states to accept international obligations, would accept the modal verb "must" as a compulsory directive, other states likely would too, especially for a duty so foundational as exercising national jurisdiction over perpetrators of serious international crimes. Indeed, the United States is partially dualist.[96] Dualism denotes that the country treats international and domestic law as two separate systems, with some international obligations not becoming binding until they are codified by domestic legislation.[97] Other states like France that embrace a monist system,[98] one that immediately deems treaties supreme law, would, if anything, be even more likely to treat the modal verb "must" as binding. The natural upshot is that most states, whether monist or dualist, would likely agree that the word "must" within the Rome Statute's preambular purposes imposes a binding obligation on member states to exercise national jurisdiction whenever possible.

According to some scholars, the object and purpose of the Rome Statute are not in every circumstance per se inconsistent with a waiver of complementarity.[99] In their view, one exigent circumstance sanctioning a waiver is when a politically fraught controversy would enfeeble the reputation of national trials or undercut "national reconciliation."[100] The quandary for the proponents of this view is that the Rome Statute already

91. Medellin v. Texas, 552 U.S. 491, 508 (2008).
92. *Id.* at 498–99, 510–11.
93. *Id.* at 498–99.
94. *Id.* at 508.
95. *Id.*
96. D.A. Jeremy Telman, *A Monist Supremacy Clause and a Dualistic Supreme Court: The Status of Treaty Law as U.S. Law.*, VAL. U. SCH. L. 1, 4–5 (2013).
97. *Id.*
98. G. Ferreira & A. Ferreira-Snyman, *The Incorporation of Public International Law into Municipal Law and Regional Law Against the Background of the Dichotomy Between Monism and Dualism*, 17 POTCHEFSTROOM ELEC. L. J. 1470, 1489 (2014).
99. *See, e.g.*, Akhavan, *supra* note 5, at 414.
100. *Id.*

provides a remedy for extremely politically fraught situations: a self-referral where the state is unable for political or judicial reasons to prosecute the aggressor.[101] So unless every instance where a state is considering "national reconciliation" implicates an inability to prosecute, some of the state's self-referrals would impinge on the complementarity principle.

Other scholars maintain that a waiver of complementarity is consonant with the Rome Statute's aim of ending impunity because the referring state ensures that the ICC investigates and prosecutes the crimes.[102] But that position fails to account for the state's ability to prosecute the crimes itself. More important, that position elevates the norm of ending impunity above the co-equal norm of complementarity. Resultantly, a purposive analysis disfavors waivers of complementarity.

VI. Pragmatic Perspective Against Waivers of Complementarity

Waivers do not find support from a pragmatic analysis, either. One could argue, albeit tenuously, that a state could deliberately delay prosecution of a suspect to trigger the admissibility of the case before the ICC based on the state's "unwillingness" to prosecute. However, that theory would incorrectly equate a state's *ability* to avoid domestic prosecutions with a state's *permission* to do so. Pragmatically speaking, states can sometimes avoid international obligations and even at times do so with impunity. But a particular state's impunity reflects a defect not in the norms the state flouted but in international law's enforcement mechanisms. International law lacks most of the enforcement mechanisms of domestic law and frequently depends on states voluntarily complying with international obligations.[103]

Another pragmatic argument for waivers is that the ICC prosecutor may in fact prefer states' self-referrals to proprio-motu referrals because the former entails the state's cooperation with the ICC whereas the latter may entail an "adversarial relationship between the prosecutor and the state."[104] That is true. But that addresses self-referrals, not waivers. Namely, a state that is unable to prosecute a perpetrator would appropriately coordinate with the ICC in hailing the suspect before the ICC. If able and willing to prosecute, by contrast, the state would understandably have an adversarial relationship with the ICC if the ICC meddled with a national criminal trial.

The more vexed issue is whether a state violates the complementarity principle when able but unwilling to prosecute the aggressor. Although a state's unwillingness to prosecute triggers the admissibility of the case before the ICC, admissibility does not imply that the state's referral necessarily comported with complementarity. Rather, the admissibility signals

101. Rome Statute, *supra* note 1, at 9–11.
102. Benzing, *supra* note 13, at 630.
103. Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1829 (2002).
104. Akhavan, *supra* note 5, at 405.

compliance with complementarity by the *ICC*, not the state.[105] The ICC may justifiably proceed amid a state's "unwillingness" referral, but the state will have undoubtedly abdicated its duty to exhaust local remedies, which represents the core of complementarity.

At least one scholar has suggested that concerns about complementarity are undue, in part because Article 53 of the Rome Statute permits the prosecutor to "reject claims that were frivolous or not warranting international adjudication."[106] However, such a defense against abuses likely would not prevent all of them given that it is still subject to the prosecutor's discretion. And at any rate, the existence of such a defense does not necessarily indicate that waivers are legal.

From a pragmatic standpoint, the only way for waivers of complementarity to become legal is by developing into nascent customary international law. If enough states fecklessly waived complementarity, waivers would become the general practice of nations. And if a sizeable portion of the states began to deem waivers necessary to end impunity, the states' waivers would potentially reflect *opinio juris* (the states' belief that they are acting out of a legal obligation). This method to legalize waivers is highly undesirable as it would involve states derogating from existing custom that treats the ICC as a court of last resort.

Conclusion: A New Theory on Waivers and Normative Implications of Complementarity

As a new theory on complementarity, one that forecloses waivers, this article postulates that the ICC's complementarity regime is binary: one part jurisdictional and another part remedial. Jurisdictional complementarity arises from the state or ICC validly exercising mutually exclusive jurisdiction.[107] Remedial complementarity, by contrast, is based solely on the state's exhaustion of local remedies.[108] In one sense, the two types of complementarities overlap. Namely, when a state satisfies jurisdictional complementarity by prosecuting a perpetrator, the state simultaneously fulfills remedial complementarity by exhausting local remedies. Similarly, when the ICC satisfies jurisdictional complementarity by prosecuting an aggressor if the state was unable to do so, the state will have still satisfied remedial complementarity because its inability to prosecute suggests that it exhausted the inadequate local remedies.

105. Rome Statute, *supra* note 1, at 1, 10–11.

106. Akhavan, *supra* note 5, at 414.

107. Rome Statute, *supra* note 1, at 10–11. The Rome Statute implicitly refers to a mutually exclusive exercise of jurisdiction in the statute's section on the admissibility of a case. Although the statute uses the term "admissibility" rather than "jurisdiction," "admissibility" is tacitly referencing jurisdiction (except in cases where admissibility pertains to the principle of gravity), namely the state's jurisdiction over the case. That is, when a state is exercising jurisdiction, the case becomes inadmissible to the ICC. And when the ICC is exercising jurisdiction, the state has deferred to the ICC.

108. *Id.* at 1. The requirement of exhausting local remedies is imbued throughout the Rome Statute and is contained in multiple clauses of its preamble.

However, in at least one material respect, the two types of complementarities diverge. The ICC Statute, apparently to prevent impunity, provides for the prosecution of serious international crimes even when remedial complementarity is not satisfied. That is, the ICC statute allows for the ICC to exercise jurisdiction when the state is unwilling to prosecute the perpetrator.[109] In such a case, the state has presumably not exhausted local remedies and therefore has violated remedial complementarity. Yet the ICC would still satisfy jurisdictional complementarity by a valid exercise of mutually exclusive jurisdiction. Noticeably, jurisdictional and remedial complementarities are inextricably linked but not interdependent in every instance. And the state may never jettison its duty to at least attempt remedial complementarity, even when the state intends to refer the case to the ICC if the local remedies fail.[110]

The theory of a binary complementarity regime, which this article introduces, is not merely academic. It has real-world implications. The most significant is that states and the ICC should ideally aim to satisfy both jurisdictional and remedial complementarity. States, irrespective of the ICC's valid exercise of jurisdiction, should never waive remedial complementarity by treating the ICC as a court of first resort. When equipped with the theory of a binary complementarity regime, legal analysts would likely foster a more conscious awareness of whether a state and the ICC have achieved plenary complementarity. Moreover, the theory could afford legal practitioners and scholars greater clarity about why waivers of complementarity are not legally permissible.

The benefits from avoiding waivers of complementarity are myriad. First, a state's exercise of jurisdiction protects the state's sovereignty:[111] national criminal jurisdiction "can indeed be said to be a central aspect of sovereignty itself."[112] The jurisdiction implicates the state's laws, judiciary, and police system, so a state's decision to bypass national jurisdiction in favor of ICC jurisdiction enfeebles, no matter how minutely, the state's sovereignty.

Second, waivers may inflict reputational damage on the state domestically and internationally. A waiver of complementarity, which impliedly conveys a state's unwillingness to prosecute a perpetrator, may signal that the state's judicial or law-enforcement systems suffer from major impairments. As a result, other states' perceptions of the referring state's sovereignty, political independence, and self-determination may lamentably ebb.[113]

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109. *Id.* at 10–11.

110. *Id.* at 1.

111. Britta Lisa Krings, *The Principles of 'Complementarity' and Universal Jurisdiction*, *in* INTERNATIONAL CRIMINAL LAW: ANTAGONISTS OR PERFECT MATCH?, 4 GOETTINGEN J. INT'L L. 737, 750 (2012).

112. Benzing, *supra* note 13, at 595.

113. Sovereignty is of course partially derivative of and dependent on multilateral state recognition. H. Lauterpacht, *Recognition of States in International Law*, 53 YALE L.J. 385, 385 (1944).

Third, waivers could strain the already limited resources of the ICC by incentivizing states to abstain from national prosecution in favor of ICC prosecution. Such moral hazard could generate impunity for perpetrators if states ever detrimentally rely on a merely potential ICC prosecution that never materializes. Given that the ICC has heard only 30 cases in its 19-year history,[114] the court's capacity for hearing cases is demonstrably circumscribed.

In brief, based on linguistic, teleological, and pragmatic analyses, waivers of complementarity are unlawful under the Rome Statute. A linguistic analysis shows that the ICC satisfies complementarity in its exercise of jurisdiction over a case only when a state is "unwilling" or "unable" to prosecute the aggressor.[115] The Rome Statute's lengthy definitions of "unwilling" and "unable" belie an inference that a state has license to waive the complementarity safeguarded by those definitions. Indeed, an outcome of definitional futility would not be consonant with the universal norms of linguistic communication known as the Gricean Maxims.[116] Moreover, during the deliberations preceding the Rome Statute, some of the delegates opposed incorporating a provision into the statute that would allow states to voluntarily relinquish their national jurisdiction.[117] And the duty to exhaust local remedies cannot be merely hortatory because it is so critical that it affects admissibility of a case under Article 17.[118]

Under a purposive analysis, the Rome Statute's preamble unequivocally says that states "must" ensure prosecution nationally.[119] Finally, a pragmatic analysis illustrates that while a state could theoretically trigger the ICC's jurisdiction by, say, delaying prosecution, valid jurisdiction is only one part of the complementarity equation. The state would still need to fulfill remedial complementarity, as this article shows with its new theory of a binary complementarity regime. The binary theory, an appraisal tool, could afford legal practitioners greater clarity about whether a state and the ICC have satisfied plenary complementarity. Above all, the binary theory illustrates that waivers of complementarity are unlawful.

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114. *About the Court*, INTERNATIONAL CRIMINAL COURT, https://www.icc-cpi.int/about [https://perma.cc/TPX8-58NW] (last visited April 17, 2021).

115. Rome Statute, *supra* note 1, at 10.

116. Dravling, *supra* note 78.

117. Akhavan, *supra* note 5, at 414.

118. Rome Statute, *supra* note 1, at 10.

119. *Id.* at 1.